Arumugam s/o Muthusamy v Public Prosecutor

FEDERAL COURT (KUALA LUMPUR) — CRIMINAL APPEAL NO 06-1 OF 1993
CHONG SIEW FAI CJ (SABAH & SARAWAK), PEH SWEE CHIN AND MOHAMED DZAIDDIN FCJJ
4 MARCH 1998

Evidence *— Identification evidence — Visual identification — Long lapse of time — Dock identification — Whether identification parade should have been held — Whether magistrate's failure to caution herself resulted in a miscarriage of justice*

Two questions were raised in this reference, namely: (i) whether dock identification in court after a long lapse of time without holding an identification parade could be sufficient basis for a conviction; and (ii) whether in a case dependent solely on dock identification, the failure by a magistrate to direct himself with regard to the visual evidence of identification in accordance with the established guidelines in *R v Turnbull & Ors* [1976] 3 All ER 549, resulting in a conviction based on uncorroborated evidence of identity being quashed would constitute a substantial miscarriage of justice.

Held, dismissing the appeal:

Identification of an accused for the first time in court at the trial is undesirable and it would be a good practice to hold an identification parade. However, to hold that an identification parade must, in all circumstances, be conducted in order to sustain a conviction would be too stringent. It would, therefore, depend on the particular facts and circumstances of each case whether to hold such a parade.

In the present case, the trial magistrate had not totally failed to comply with the guidelines in *R v Turnbull*. Although it would have been prudent to hold an identification parade, having regard to the cumulative effect of the evidence of both the prosecution and the defence as a whole, there was no failure of justice nor were there any grounds for contending that the conviction was unsatisfactory or unsafe. There was no reason to interfere with the trial magistrate's finding which was affirmed by the High Court (see pp 75F–G, 76I and 77B–D); *R v Turnbull & Ors* [1976] 3 All ER 549 distinguished.

[Bahasa Malaysia summary

Dua persoalan telah dibangkitkan dalam rujukan ini, iaitu sama ada: (i) pengecaman dari kandang orang salah di mahkamah selepas selang masa yang lama tanpa mengadakan perbarisan cam boleh merupakan dasar yang mencukupi untuk sabitan; dan (ii) dalam satu kes yang bersandar semata-matanya pada pengecaman dari kandang orang salah, kegagalan majistret untuk mengarah diri berkaitan dengan keterangan pengecaman visual mengikut garis panduan dalam *R v Turnbull & Ors* [1976] 3 All ER 549 sehingga mengakibatkan sabitan

berdasarkan keterangan yang tidak disokong tentang identiti dibatalkan akan membentuk salah laksana keadilan yang substansial. A

Diputuskan, menolak rayuan:

Pengecaman seorang tertuduh buat kali pertama di perbicaraan mahkamah adalah tidak diingini dan ia merupakan amalan yang baik untuk mengadakan perbarisan cam. Namun demikian, untuk memutuskan bahawa suatu perbarisan cam dalam semua keadaan mestilah dijalankan bagi mengekalkan sabitan adalah terlalu ketat. Maka, ia akan bergantung pada fakta dan keadaan tertentu setiap kes sama ada untuk mengadakan perbarisan demikian. B C

Dalam kes ini, majistret perbicaraan tidak gagal mematuhi garis panduan secara keseluruhan dalam *R v Turnbull*. Biarpun adalah bijak untuk mengadakan perbarisan cam, dengan mengambil kira kesan kumulatif keterangan kedua-dua pihak pendakwa dan pembelaan secara keseluruhan, tiada kegagalan keadilan mahupun terdapat sebarang alasan untuk menghujahkan bahawa sabitan adalah kurang memuaskan atau tidak selamat. Tiada sebab untuk mengganggu keputusan majistret perbicaraan yang disahkan oleh Mahkamah Tinggi (lihat ms 75F–G, 76I dan 77B–D); *R v Turnbull & Ors* [1976] 3 All ER 549 dibeza.] D E

Notes

For a case on visual identification, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) para 1086. F

Case referred to

R v Turnbull & Ors [1976] 3 All ER 549 (distd)

Legislation referred to

Criminal Procedure Code (FMS Cap 6) G

Appeal from: Criminal Trial No 51–31 of 1988 (High Court, Melaka)

Karpal Singh (*Karpal Singh & Co*) for the appellant.
Stanley C Augustin (Attorney General's Chambers) for the respondent. H

Cur Adv Vult

Chong Siew Fai CJ (Sabah & Sarawak) (delivering judgment of the court): Two questions were raised in this reference: I

(1) Whether dock identification in court after a long lapse of time without holding an identification parade can be sufficient basis for a conviction;

A and

(2) Whether in a case dependent *solely* on dock identification the failure by a magistrate to direct himself with regard to the visual evidence of identification in accordance with the established guidelines in *R v Turnbull & Ors* [1976] 3 All ER 549, resulting in a conviction based
B on uncorroborated evidence of identity *being quashed* would constitute a substantial miscarriage of justice.

Question (1) above

By the term 'dock identification' we take it to mean identification of an
C accused for the first time in court at trial. And we shall attempt to answer the question posed with that meaning of the term in mind.

The question, as framed, is in general terms and lacks precise or essential facts necessary for a definite answer of 'yes' or 'no'. Much depends on the precise circumtances and the stance of the defence. How
D long is the 'long lapse'? What are the circumstances in which a witness has seen the accused, eg the distance between him and the accused, the weather condition, any lighting particularly if at night, and if so, quality of the lighting, the length of time the witness sees or observes the accused, any conversation carried on between them, whether the witness had known or seen the accused prior to the incident, and so forth. Facts such as those
E mentioned above are lacking, but they are essential for the purpose of arriving at a more definite answer to the above question referred.

Generally speaking, however, a dock identification in the sense as described above, ie identification of an accused for the first time in court at the trial is undesirable, and it would be a good practice to hold an
F identification parade, which, if it turns out to be positive, would tend to strengthen the case for the prosecution. But to hold that an identification parade must, in all circumstances, be conducted in order to sustain a conviction would be too stringent. There may well be situations where an identification parade cannot or need not be held, for example, where the
G attendance of the witness at the parade is physically impossible or impracticable or there are exceptional circumstances.

Briefly, therefore, the answer to question (1) is, it depends on the particular facts and circumstances of each case.

Question (2) above
H

As regards question (2), it is important to note the following words used therein:

> Whether ... resulting in a conviction ... being quashed ... would constitute a substantial miscarriage of justice.

I In other words, the question is whether the question of such a conviction would constitute a substantial miscarriage of justice.

On the question as framed, the answer, in our opinion, is clearly in the negative.

We have considered the guidelines in *R v Turnbull & Ors* [1976] 3 All ER 549. We do not propose to reproduce them save pointing out that they may be found from pp 551j to 552j and from p 553b to j in the above report. Of course, the guidelines in *R v Turnbull* deal with directions to juries. In a summary trial, the trial magistrate assumes the functions of the judge and the jury.

In the instant case under reference, the facts and circumstances are different. In this case, there were two identification witnesses, PW1 and PW2. In point of law, an identification by one witness can constitute support for the identification by another provided that the trial magistrate warns himself that even a number of honest witnesses can all be mistaken. In our present case, though the trial magistrate did not warn herself in like terms, she was mindful of the fact that PW1 and PW2 had never seen the accused prior to the incident on 1 April 1986 or 2 April 1986. The quality of the identification evidence was good. In the circumstances as shown by the evidence, she found it reasonable that they could remember the accused's face, and she accepted their evidence. Furthermore, there are other evidence — the car keys in the applicant's possession at the time of his arrest; both PW4 and PW5, who effected the arrest, said they used to see the applicant driving the car, and the car was parked in front of the shop where the applicant lived. Both PW4 and PW5 were not cross-examined.

The defence of the applicant, on the other hand, is one of complete denial. He denied taking the car from the complainant's house on 1 or 2 April 1986. Apart from admitting being arrested by the police on 17 May 1986 at about 11am, he denied handing the car keys to the police. He denied driving the car. He even denied that the police had on 17 May 1986 recovered the car from him or from the front of the shop No 10 Market Street, Gopeng, where he then lived. His story was rejected by the trial magistrate who also noted that no notice of alibi was given to the prosecution as required under the Criminal Procedure Code (FMS Cap 6). It is true that the evidence of what had happened in or near shop No 10, even if believed, in itself and without more, could not go to prove the act of stealing. But it must be remembered that the central issue was one of identification, ie whether the applicant was at the complainant's house in the night of 1 April 1986 or early morning of 2 April 1986. In this regard, the trial magistrate was entitled to consider all the evidence adduced in the case as a whole. What the applicant has stated in court when tested against the testimonies of PW1, PW2, PW4 and PW5 goes to the question of credibility. As it turned out, the trial magistrate believed the evidence of PW1 and PW2.

As regards the guidelines in *R v Turnbull*, it would not be right to say that the trial magistrate had totally failed to comply with them. Indeed, in fairness to Mr Karpal Singh acting for the applicant, this was not his contention. As a matter of fact, the trial magistrate did examine the circumstances in which PW1 and PW2 identified the applicant on 1 or 2 April 1986, eg the area in that night was bright, that the meeting with the applicant was for some 15 minutes, etc.

The only failure by the trial magistrate, as contended for the applicant, was the administration of caution to herself. In this regard, the guidelines in *R v Turnbull* stated (at p 554C):

> A failure to follow these guidelines is likely to result in a conviction being quashed and will do so if in the judgment of this court on all the evidence the verdict is either unsatisfactory or unsafe.

In the instant case before us, it would have been prudent to hold an identification parade. However, having regard to the cumulative effect of the evidence of both the prosecution and the defence as a whole, more particularly, the evidence of PW1 and PW2 which both courts below accepted, the supporting evidence respecting, inter alia, the recovery of the car keys from the applicant, the use of the car by the applicant, the removal of the car from the front of the shop where the applicant lived, as well as the stance of the applicant in his defence, which was an absolute denial, we see no failure of justice having occasioned nor do we see any ground for contending that the conviction is unsatisfactory or unsafe. This is not a case in which the witness's ability to make identification is in doubt. We see no reason to interfere with the trial magistrate's finding which was affirmed by the High Court. We are of the unanimous view that on the particular facts and circumstances of this case, there had been no miscarriage of justice and that the concurrent findings of the trial magistrate and the High Court ought not to be disturbed. We accordingly order the conviction and the 14 months imprisonment sentence do stand.

As the applicant is on bail, the bail is hereby revoked. Security deposit for the bail, if given, to be returned. The applicant do forthwith serve the sentence as imposed, regard, however, to be had to the time of imprisonment that he has already served.

Appeal dismissed. Conviction and sentence confirmed.

Reported by David Lai